

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of:

The Commission's Forfeiture Policy  
Statement and Amendment of Section 1.80  
of the Rules To Incorporate the  
Forfeiture Guidelines

CI Docket No. 95-6

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**COMMENTS OF THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION**

The Personal Communications Industry Association ("PCIA") herewith submits its comments on the above-captioned *Notice*.<sup>1</sup> This proceeding has been undertaken due to the Court of Appeals' recent reversal of the Commission's 1991 issuance of the policy statement,<sup>2</sup> which implemented guidelines for forfeiture cases,<sup>3</sup> and seeks to fulfill the Administrative Procedure Act requirements necessary to implement the *Policy Statement* for future forfeiture cases. As discussed below, while PCIA agrees that forfeiture standards can promote uniformity in the application of forfeitures involving similarly situated carriers,<sup>4</sup>

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<sup>1</sup> The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules To Incorporate the Forfeiture Guidelines, CI Docket No. 95-6 (Feb. 10, 1995) ["*Notice*"].

<sup>2</sup> See *United States Telephone Association v. F.C.C.*, 28 F.3d 1232 (D.C. Cir. 1994).

<sup>3</sup> *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993) ["*Policy Statement*"].

<sup>4</sup> While it is crucial that the FCC's guidelines reflect uniform and equitable treatment of similar services, the agency should retain discretion in their application. PCIA does not believe that the Commission should adopt the guidelines as a binding rule, but should retain the discretion to depart from the guidelines in appropriate circumstances. An example of the  
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PCIA does not believe the existing *Policy Statement* adequately addresses disparities in the size of land mobile radio operators and will result in decisions that impose excessive penalties on smaller carriers. PCIA therefore suggests reforming the *Policy Statement* to treat all Commercial Mobile Radio Service providers under the forfeiture guidelines developed for Part 90 licensees.

Following its recent merger with the National Association of Business and Educational Radio, Inc., PCIA now represents the full spectrum of land mobile radio operators. The new PCIA is an international trade association created to represent the interests of both the commercial mobile radio service ("CMRS") and the private mobile radio service ("PMRS") communications industries.<sup>5</sup> Because PCIA represents both large and small carriers, PCIA

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<sup>4</sup>(...continued)

need for this flexibility is presented by the Commission's proposal to develop and implement a tower registration process that will help identify antenna structure owners who are responsible for complying with antenna structure marking and lighting guidelines. See *Streamlining the Commission's Antenna Structure Clearance Procedure and Revision of Part 17 of the Commission's Rules Concerning Construction, Marking and Lighting of Antenna Structures*, WT Docket No. 95-5. The Commission proposes to make antenna structure owners primarily responsible for compliance with the marking and lighting rules. PCIA noted in its comments in that proceeding that in cases where a structure owner cannot be identified and the Commission seeks redress from the individual licensees located on that structure, the regulations should be crafted in such a manner as to ensure that the total fines assessed on the licensees not exceed the amount of the fine that would have been assessed on the structure owner. See *Comments of PCIA*, WT Docket No. 95-5 (filed Mar. 21, 1995) at 3. In this proceeding PCIA asks the Commission to act consistent with the Association's comments in WT Docket No. 95-5.

<sup>5</sup> PCIA's federation of councils includes: the Paging and Narrowband PCS Alliance, the Broadband PCS Alliance, the Specialized Mobile Radio Alliance, the Site Owners and Managers Association, the Association of Wireless System Integrators, the Association of Communications Technicians, and the Private System Users Alliance. In addition, as the FCC-appointed frequency coordinator for the 450-512 MHz bands in the Business Radio Service, the 800 and 900 MHz Business Pools, the 800 MHz General Category frequencies  
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has been concerned with the impact of the *Policy Statement* since its original formulation in 1991. PCIA, then known as Telocator, filed a petition for reconsideration in that proceeding seeking to rectify the fundamental inequity resulting from treating local "mom and pop" paging systems the same as a regional local exchange companies.<sup>6</sup> PCIA also sought revisions to the *Policy Statement* in the proceeding to harmonize the technical and regulatory rules for CMRS carriers in Part 22 and Part 90, arguing that the regulatory parity model adopted in the *Omnibus Budget Reconciliation Act* provided further support for reasonable treatment of CMRS carriers.<sup>7</sup>

Under the proposed *Policy Statement*, Part 22 operators are classified as "common carriers" and Part 90 operators are classified as "other." Thus, for Part 22 CMRS licensees, the maximum forfeiture is \$100,000 for each violation or each day of continuing violation (not to exceed \$1,000,000). For Part 90 CMRS licensees, the maximum forfeiture is \$10,000 for each violation or each day of continuing violation (not to exceed \$75,000). For every category of violation except one,<sup>8</sup> in fact, Part 22 CMRS licensees are subject to

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<sup>5</sup>(...continued)  
for Business Eligibles and conventional SMR systems, and the 929 MHz paging frequencies, PCIA represents and serves the interests of tens of thousands of licensees.

<sup>6</sup> Telocator Petition for Reconsideration (filed Sep. 9, 1991) (requesting reconsideration of *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991)).

<sup>7</sup> See, e.g., PCIA Comments, GN Docket No. 93-252 (filed Nov. 8, 1993) at 38-39; PCIA Petition for Reconsideration, GN Docket No. 93-252 (filed Dec. 21, 1994) at 7-8.

<sup>8</sup> The proposed forfeitures for violations of the antenna marking and lighting rules are the same for both Part 90 and Part 22 licensees.

proposed forfeitures that are *ten times higher* than the proposed forfeitures for Part 90 CMRS licensees.<sup>9</sup>

Section 503 of the Communications Act does not provide any basis for the Commission to assess forfeitures relying on the class of the licensee or regulatee involved. Instead, the section states that treatment under the Commission's forfeiture authority should be based on factors such as "the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."<sup>10</sup> These factors, however, do not support differentiating between cable television operators and radio common carriers, much less between Part 90 and Part 22 CMRS operators.

Notwithstanding the lack of explicit policy justification for differentiating between classes of operators, both the original *Policy Statement* and the newly proposed guidelines set base forfeiture amounts by relying on percentages of the statutory maximums for enumerated violations. Because the statutory maximums for common carriers are larger than for other types of operators, the proposed guidelines therefore result in base forfeiture amounts for common carriers that are proportionately higher. The fact that the statutory *maximums* are higher for common carriers, however, does not mean that the *base forfeiture amounts* should be higher. When Congress raised the maximum forfeiture limits for common carriers, it stated the increases were necessary "to recognize that penalties must be significant if they are

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<sup>9</sup> As PCIA has related in its prior pleadings in GN Docket No. 93-252 (*see* note 5, *supra*), the disparity between the forfeitures for Part 22 and Part 90 CMRS licensees raises a substantial question as to whether the Commission has fulfilled its obligations under the regulatory parity provisions of the *Omnibus Budget Reconciliation Act*.

<sup>10</sup> 47 U.S.C. § 503(b)(2)(D).

expected to serve both as a meaningful sanction to the wrongdoer and a deterrent to others."<sup>11</sup> This was an implicit recognition that the Commission needed higher maximums to penalize adequately *some* operators within the category of common carriers. This in no way implies that *all* operators within the category of common carriers should be subject to exorbitant maximum penalty amounts, that common carriers as a class are more "culpable" or have more of an ability to pay than other classes of regulatees, or that base forfeiture amounts for common carriers should be higher. Thus, to set base forfeiture amounts solely as a percentage of statutory maximums eviscerates the intent of Section 503.

For CMRS carriers, the proposed *Policy Statement* will result in grossly inflated and unwarranted forfeitures. Under the *Policy Statement*, CMRS carriers -- which include hundreds of paging operators with fewer than 1,000 customers -- are treated no differently than regional local exchange telephone companies with millions of customers. PCIA continues to believe that equity dictates altering the forfeiture guidelines to differentiate explicitly between carriers based upon their size. In particular, PCIA believes that CMRS operators (whether authorized under Part 90 or Part 22) all should be treated under the forfeiture guideline limits currently set for Part 90 licensees.

PCIA supports the Commission's goal in this proceeding of ensuring comparable treatment of similarly situated licensees under the forfeiture policies. Unfortunately, the *Policy Statement* as currently drafted will not provide uniform or equitable treatment for many land mobile carriers. Instead, the Commission should adopt PCIA's proposal to treat CMRS carriers under the Part 90 forfeiture limits, which would further the Commission's


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<sup>11</sup> H.R. Conf. Rep. No. 101-386, 101st Cong., 1st Sess. 435 (1989).

achievement of its regulatory parity goals, be consistent with the Section 503 mandates, and more effectively achieve the public interest.

Respectfully submitted,

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Dated: March 27, 1995